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V. B. Goldsack

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-188686

DATE: May 11, 1978

MATTER OF: Robert C. Austin - Overtime Compensation

- DIGEST:**
1. Bureau of Prisons employee whose assigned duties as an Inter-Group Coordinator at Terminal Island, California, included supporting inmate activities outside his scheduled duty hours, as well as within them, is entitled to be compensated for the overtime performed since its performance was actively induced by the official with authority to order or approve overtime.
 2. Bureau of Prisons employee who performed extra duties during his regular tour of duty on holidays is entitled to holiday pay for such duty. He is entitled to overtime compensation for duties on a holiday performed outside of his regular tour of duty. However, since night and Sunday duties are not shown to have been recurring or habitual in nature, he may not be paid Sunday and night premium pay.

Mr. Robert C. Austin, an employee of the Bureau of Prisons, has appealed the action of our Claims Division which denied his claim for overtime compensation for work allegedly performed by him in connection with inmate organizations. He also claims holiday, night, and Sunday pay. Mr. Austin points out in his appeal that a similar claim in the amount of \$6,000 was allowed by our Claims Division to Mr. Jim L. Hudson, one of his fellow employees at Terminal Island, and he requests that we reconsider his claim in view of the apparent discrepancy.

The record shows that Mr. Austin is employed as an Inter-Group Coordinator at the Federal Corrections Institution, Terminal Island, California. Mr. Austin claims that during his employment at Terminal Island he was required to perform work outside of his normal duty hours. This work consisted of escorting inmates on trips and attending meetings and other functions of inmate organizations. Our Claims Division stated the following in denying Mr. Austin's claim:

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"In regard to your claim for overtime compensation, 5 U. S. C. 5542(a) provides in pertinent part:

"Hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or in excess of 8 hours in a day, performed by an employee are overtime work and should be paid for. . . ."

In addition, the implementing regulation, 5 CFR 550.111(c), provides that:

"(c) Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated."

"As indicated above, the general rule is that only that overtime which has been officially ordered or approved in writing by an appropriate official is compensable overtime. However, it is recognized that written authorization or approval is not required when it is determined that responsible officials have 'affirmatively induced' an employee to perform overtime services. The facts must show, however, that there was more than only a 'tacit expectation' by the officials that overtime be performed. See Baylor v. United States, 198 Ct. Cl. 331 (1972) and cases cited therein.

"In this instance, the record is clear that the overtime work you allegedly performed was neither ordered nor approved in writing by officials possessing the authority to authorize such work. In addition, on the present record, it does not appear that the 'affirmative inducement' otherwise necessary for the allowance of your claim is present. Although you may have actually performed the overtime duties, the present record indicates no more than a 'tacit

'expectation' that you would perform the overtime. Accordingly, no basis exists on the present record for payment of this portion of your claim."

The evidence submitted by Mr. Austin to support his claim includes a position description of an Inter-Group Coordinator dated June 3, 1971, which states the duties in pertinent part as follows:

"J. Introduction:

"Under the general supervision of the Supervisor of Education, Men's Division, the incumbent is responsible for coordinating, monitoring, and directing the activities of all inmate Ethnic and 'Service-oriented' organizations approved by the Warden. These groups may include but need not be limited to Black, Mexican-American, Indian, Toastmasters, B'Nai Brith, and any other approved organizations for the improvement of inmate welfare. Such organizations are often referred to as Self-Help groups.

* * * * *

"It will be the responsibility of the Incumbent to both enhance and enrich the programs of these organizations and to insure some degree of inter-group activity. This should reduce any divisiveness and create a more harmonious atmosphere within the Institution.

"II. Major Duties and Responsibilities:

- "1. Works with inmate organizations on establishing goals, objectives and methodology to insure all are in keeping with Bureau and institutional objectives.
- "2. Locates and utilizes staff sponsors who are receptive to the concepts previously noted. These sponsors would attend their respective organizational meetings to insure that they are remaining true to their objectives.

- "3. Will serve as the Coordinator and approving staff member for such things as outgoing organizational letters leaving the Institution; the seeking of community speakers for the organizations; and will coordinate with other Departments whenever his activities warrant it; e. g., Recreation, Religious, Food Service, etc.
- "4. Shall maintain such records as are necessary to insure the orderly operation of the program.

"III. Job Controls:

"Incumbent functions under the general supervision of the Supervisor of Education. Policy matters may frequently be referred to the Associate Warden for resolution.

"Hours of work will be flexible but it is anticipated that most of his work days will be afternoons and evenings."

In addition, a report entitled "Dual Compensation" from Mr. David C. Lundgren, Acting Warden, FCI, Terminal Island, to the Chief of Labor-Management Relations, Bureau of Prisons, states the following:

"To provide the type of meaningful and on-going community programs desired, we need employee sponsors and escorts. They are not easy to obtain without compensation and therefore, a few employees carry the brunt of the load.

"At present, the Inter-Group Coordinator position is being used to sponsor several organizations and to escort trips. This is not the primary function of this position and should not be for several reasons, a few of which are reduced availability to all organizations and curtailment of coordinating activities. The position is used as such in order to keep inmate organizations functioning."
(Underscoring supplied.)

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The report shows the amount of extra work various employees perform in supervising inmate activities. The record for Robert C. Austin shows that he performed approximately 17-1/2 hours a week of extra duty supervising a variety of inmate activities.

The Bureau of Prisons states that the supervision of inmate activities after regular duty hours was voluntary in view of the clear wording in Bureau of Prisons Policy Statement 3710.2, November 30, 1972. This Statement is as follows:

"1. PURPOSE. To provide an official statement enunciating the Bureau's policy on requesting and accepting voluntary services from employees outside of normal working hours.

"2. BACKGROUND. During the recent negotiations with the Council of Prison Locals AFGE, members of the Union negotiating team expressed continuing concern over the issue of solicitation of employees' voluntary services outside of normal working hours. This included such activities as accompanying inmates to ball-games and other excursions and acting as sponsors of various evening and weekend activities. In order to allay their legitimate concern in this area, it was agreed to issue this Policy Statement.

"3. POLICY. No pressure may be placed on any employee to perform voluntary services. That is, no employee may be asked to perform such a service under conditions which would make him feel he had to give a 'yes' or 'no' answer. It is acceptable to post a general notice to all employees with instructions as to whom an employee may volunteer if he wishes, but in no case should a public sign-up sheet be used, nor should any employee or group of employees, be approached in person with the request. In such a procedure an employee could feel he was being pressured to volunteer.

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"Further, no reference to voluntary activities will be made on any document used in promotion, performance evaluation or incentive awards processes.

"4. ACTION. This policy shall be communicated to all employees."

The above policy, however, has more of an application to other staff members at Terminal Island and less application to Mr. Austin, in view of the fact that Mr. Austin, as Inter-Group Coordinator, was himself in charge of "locating and utilizing staff sponsors" to attend the inmate activities and it was incumbent on him rather than other staff members to ensure the smooth operation of the variety of inmate programs both within and outside of normal work hours.

With respect to the claim of Mr. Hudson which was allowed by our Claims Division, it was found that his sponsorship of Terminal Island's Alcoholics Anonymous-Narcotics Anonymous (AA-NA) program required substantial after-hours work. In that case the Bureau of Prisons also argued that none of the claimed overtime work was ordered or approved and that it was voluntary. In view of the circumstances, which were similar to those described here, and since Mr. Hudson's job description stated "He supervises weekly AA-NA meetings in the institution after regular working hours * * * [and] takes inmate AA members to outside AA meetings * * *," it was found that the work had been induced under the criteria in Baylor v. United States, 198 Ct. Cl. 331 (1972), and was "ordered or approved" by the appropriate official. The only difference between Mr. Austin's and Mr. Hudson's case is that Mr. Hudson's position description specifically called for the performance of overtime. We do not think, however, this makes Mr. Austin's claim defective as Mr. Austin's job description calls for the performance of the same type of activities found compensable in Mr. Hudson's case. In view of the surrounding circumstances, which point out the emphasis on support of inmate activities, and especially since the job of Inter-Group Coordinator was itself designed to ensure these activities were fully supported and carried out, we find that Mr. Austin was actively induced to sponsor inmate activities outside of his work hours. As in Mr. Hudson's case, the Warden, the official authorized to order and approve overtime, must have been aware that Mr. Austin was performing the overtime.

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In addition, 5 U. S. C. § 5546 (1970) states the following concerning holiday pay entitlement:

"(b) An employee who performs work on a holiday designated by Federal statute, Executive order * * * is entitled to pay at the rate of his basic pay, plus premium pay at a rate equal to the rate of his basic pay, for that holiday work which is not--

"(1) in excess of 8 hours, or

"(2) overtime work as defined by section 5542(a) of this title."

In view of the fact that Mr. Austin's extra duties as Inter-Group Coordinator have been found to be compensable work, it is evident that Mr. Austin may also be compensated holiday pay if his work qualifies for it under 5 U. S. C. § 5546. Section 5546 has been interpreted to permit payment of holiday pay for those hours of work which were performed on holidays during the employee's regular tour of duty, i. e., the hours of his regular shift of duty. Hours of work performed on holidays outside of the employee's regular tour of duty, however, would be compensated at overtime rates. 50 Comp. Gen. 519, 524 (1971); 38 id. 580 (1959); 37 id. 1 (1957).

The provision concerning entitlement to night pay found at 5 U. S. C. § 5545 (1970) states as follows:

"(a) Except as provided by subsection (b) of this section, nightwork is regularly scheduled work between the hours of 6:00 p. m. and 6:00 a. m., and includes--

"(1) periods of absence with pay during these hours due to holidays; and

"(2) periods of leave with pay during these hours if the periods of leave with pay during a pay period total less than 8 hours.

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Except as otherwise provided by subsection (c) of this section, an employee is entitled to pay for nightwork at his rate of basic pay plus premium pay amounting to 10 percent of that basic rate. This subsection and subsection (b) of this section do not modify section 180 of title 31, or other statute authorizing additional pay for nightwork."

In order for an employee to receive night differential, the performance of duty at night must recur on successive days or after specified intervals, or the nightwork must be habitually performed. B-174388, March 22, 1973; 42 Comp. Gen. 326 (1962); and 40 id. 397 (1961). Since there is no showing in the record that this is the case, night pay may not be paid for the duty which Mr. Austin performed at night.

The provision concerning entitlement to Sunday pay is found at 5 U. S. C. § 5546(a) (1970) and provides as follows:

"(a) An employee who performs work during a regularly scheduled 8-hour period of service which is not overtime work as defined by section 5542(a) of this title a part of which is performed on Sunday is entitled to pay for the entire period of service at the rate of his basic pay, plus premium pay at a rate equal to 25 percent of his rate of basic pay."

In view of the fact the Sunday duty involved was not performed within Mr. Austin's regularly scheduled tour of duty, but rather, was necessarily performed outside his regularly scheduled tour of duty, or outside his basic workweek, he would not be entitled to Sunday premium pay. 46 Comp. Gen. 337 (1966). See also 57 Comp. Gen. 43 (1977).

We note that 5 U. S. C. § 5546(a) has been interpreted in a similar manner to 5 U. S. C. § 5545(a) concerning night pay and that a first-40-hour employee was found entitled to Sunday pay because of the habitual performance of Sunday work. 57 Comp. Gen. 43 (1977). However, since there is no showing that Mr. Austin performed Sunday work on a habitual and recurrent basis, the duty performed by him on Sunday is not compensable under the rationale in 57 Comp. Gen. 43 (1977).

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Accordingly, Mr. Austin is entitled to overtime and holiday pay in accordance with the above. Appropriate action will be taken to determine the amount of entitlement so that payment may be made.

R. F. Keller
Deputy Comptroller General
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20541

V B Goddard
CO.

B-188686

May 11, 1978

The Honorable Adlai E. Stevenson
United States Senator
230 South Dearborn Street
Chicago, Illinois 60604

Dear Senator Stevenson:

We refer to your interest in the claim of Mr. Robert C. Austin, 4801 Clair Del Avenue, North Long Beach, California 90807, an employce of the Bureau of Prisons, who requested that the denial of his claim for overtime compensation be reconsidered.

By decision B-188686 of today, copy enclosed, we hold that Mr. Austin's claim for overtime and holiday pay may be allowed, but his claim for Sunday and night premium pay is denied. Payment will be made when the amount of entitlement is determined.

Sincerely yours,

R. Z. K. 11/11
Deputy Comptroller General
of the United States

Enclosure

UNITED STATES GOVERNMENT

V. B. Goddard
GENERAL ACCOUNTING OFFICE *Sp*

Memorandum

TO : Director, Claims Division

May 11, 1978

FROM : Deputy
Comptroller General *R. F. Kenna*

SUBJECT: Robert C. Austin - Claim for Overtime, Holiday, Night,
and Sunday Pay - B-188686-O.M.

Returned is file Z-2598192. Attached is our decision of today,
B-188686, which allows Mr. Robert C. Austin's claim for overtime and
holiday pay and which disallows his night and Sunday pay claim. Action
should be taken to ensure payment is made in accordance with the holding
in B-188686.

Attachments